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Supreme Court of the United States

OCTOBER TERM, 1966

No. 327

WESLEY G. NELLES

Appellant,

vs.

LYNN M. BARTLETT, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF MICHIGAN

AND

LENTON G. SCULTHORP, SUCCESSOR TO LYNN M. BARTLETT

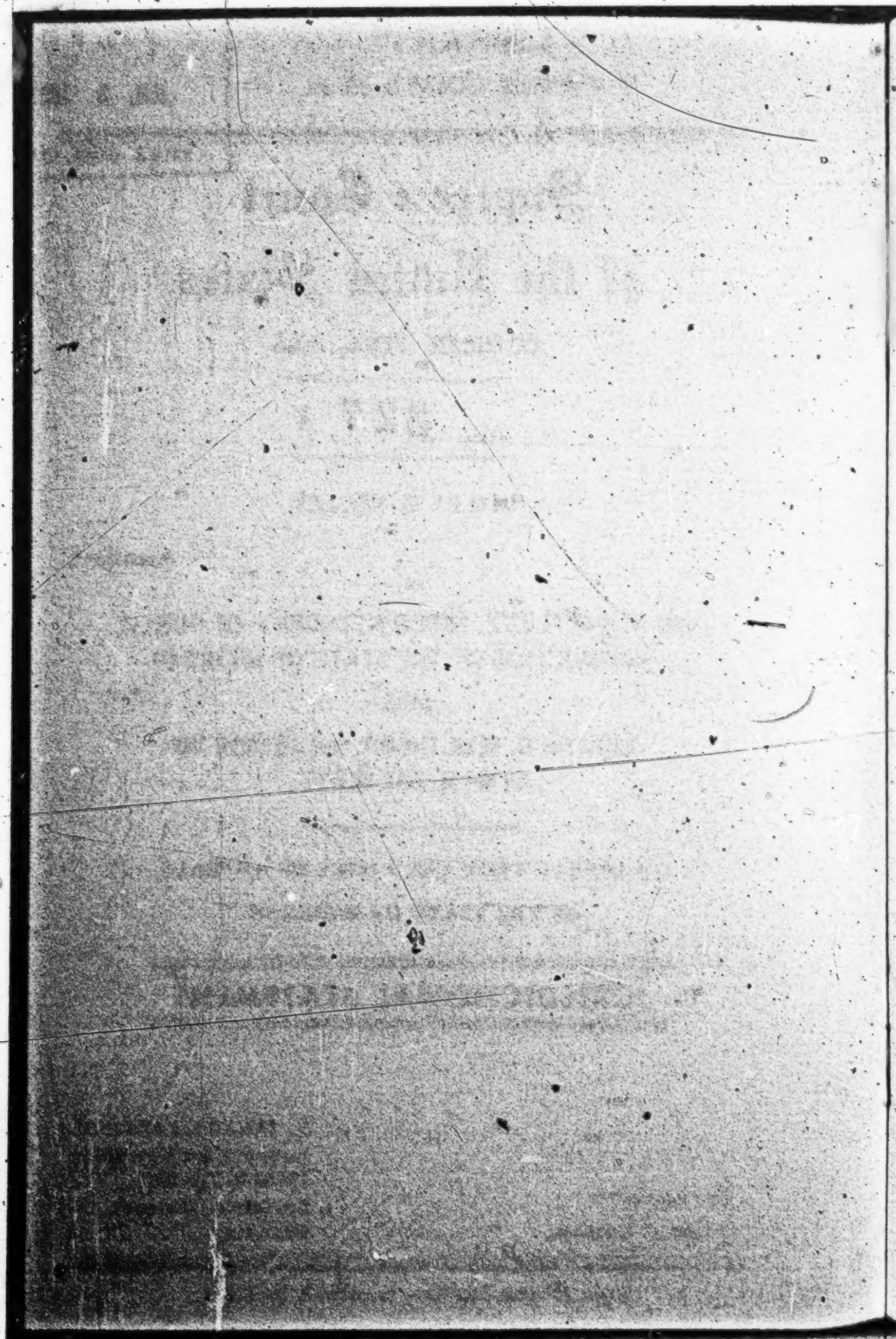
ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

S. JAMES CLARKSON,
Attorney for Appellant,
19666 W. Ten Mile,
Southfield, Michigan,
353-6444.

Of Counsel:
JOHN L. GRUBBA

BOULEVARD PRESS – Southfield, Michigan



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Opinions Below.

The Opinion of the Circuit Court of Wayne County, Michigan, is not reported. The Opinion of the Court of Appeals of Michigan affirming the Judgment of the Circuit Court is reported in 5 Mich. App. 47, 145 N.W. 2nd 795. The orders of the

Supreme Court of Michigan denying Leave to Appeal and denying Re-Hearing thereon are not reported. The Opinions of the Circuit Court and the Court of Appeals of Michigan as well as the orders of the Supreme Court of Michigan are set forth in the Appendix, Infra.

Jurisdiction

This suit was brought in the Circuit Court of the County of Wayne, State of Michigan, on March 15, 1962. The Bill of Complaint, Division I, sought a decree declaring that Act 257, Public Acts of 1959, as amended by act 132 of the Public Acts of 1961, known as the Psychologist Registration Act, being Sec. 338.1001, C.L. 1948 et. seq.; M.S.A. 1961 Cum. Supp. 14.677 (1) et. seq., was, as applied to the facts of this case and on its face, repugnant to the Constitution of the United States and invalid. The Circuit Court of Wayne County, Michigan, decided the question in favor of the validity of the statute. The Court of Appeals of the State of Michigan affirmed the decision of the lower court on November 9, 1966. On January 16, 1967, the Supreme Court of the State of Michigan issued its Order denying Leave to Appeal. On March 14, 1967, the Supreme Court of the State of Michigan entered its order denying Re-Hearing on the Leave to Appeal. Appellant filed Notice of Appeal to the Supreme Court of the United States with the Court of Appeals of the State of Michigan on May 5, 1967, and on May 10, 1967, filed a similar Notice of Appeal on the Supreme Court of the State of Michigan and in the Circuit Court for the County of Wayne, State of Michigan. All three courts being possessed of a portion of the record in this cause. Jurisdiction to review a Judgment of the Court of Appeals of the State of Michigan by appeal is conferred on

this Court by 28 U.S. Code Sec. 1257 (2). That such jurisdiction exists in the circumstances of this case is sustained by the following decisions: Winters v. People of the State of New York, 333 U.S. 507; People of the State of New York v. Zimmerman, 278 U.S. 63; Dent v. West Virginia; 129 U.S. 114; Schroeder v. City of New York, 371 U.S. 208.

Statute involved.

CERTIFICATION OF PSYCHOLOGISTS

Act 257, 1959, p 394; eff March 19, 1960 (§§ 14.677 (1) – 14.677 (19).

AN ACT to provide for the certification of psychologists; to define the powers and duties of the superintendent of public instruction; and to provide penalties for violations of this act.

The People of the State of Michigan enact:

§14.677 (1) Definitions] Section 1. As used in this act:

(a) "Psychology" means an academic discipline pertaining to the scientific study of the traits, feelings, actions, attitudes, emotions and behavior patterns of vertebrates.

(b) "Psychologist means a person who applies the academic knowledge of psychological studies to the problems of animal and human behavior in the various applied areas of specialization in the fields of industrial, experimental, clinical, personnel, educational, criminal, social, comparative, personality and human behavior psychology. The treatment of mentally, emotionally or psychosomatically ill persons by means of psychotherapy or by any other means whatsoever is not included in the practice of psychology as defined under this act.

§14.677(2) Superintendent of public instruction, duties.] Sec. 2. The superintendent of public instruction shall:

(1) Certify applicants at the 3 levels of psychological competence as specified by this act.

(2) Evaluate applicants for certification at the 3 levels of competence as specified by this act. All examinations of applicants provided for in this act shall be conducted by committees designated by the superintendent.

(3) Make such rules and regulations, in accordance with Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to [24.80] of the Compiled Laws of 1948, and subject to Act No. 197 of the Public Acts of 1952, as amended being sections 24.101 to 24.110 of the Compiled Laws of 1948, as may be necessary to carry out the purposes and enforce the provisions of this act.

(4) Investigate alleged violations of the provisions of this act and conduct hearings in respect thereto when in his discretion it appears to be necessary.

(5) Accept grants from individuals, foundations, institutions and others to be used to carry out the purposes of this act.

§14.677(3) Applicants for certification; qualifications.] Sec. 3. Every applicant for certification under this act shall:

(1) Be of good moral character and reputation.

(2) Be a citizen of the United States or have declared his intention of becoming one.

(3) Be at least 21 years of age.

(4) Meet the minimal educational and experience requirements stated in sections 4, 5 or 6.

§14.677(4) Consulting psychologist certification; qualifications of applicant; fees.] Sec. 4. Except as provided in

this act, every applicant for certification as a consulting psychologist shall meet the following requirements, in addition to those specified in section 3.

(1) Be duly graduated with a doctoral degree in psychology, or its equivalent, from a reputable institution generally so recognized at the time of granting of such degree.

(2) Have completed at least 5 years of professional experience [, including 1 year of supervised experience,] acceptable to the superintendent, with at least 4 years of such experience acquired subsequent to the granting of the doctoral degree or its equivalent.

(3) Have passed an examination in his specialty and in such other fields of psychology as are deemed necessary by the superintendent to assure his professional competence.

(4) Have not failed such an examination within the 6 months next preceding the date of the examination.

(5) Have paid a certificate fee and, where an examination is required, an examination fee. The examination fee and the certificate fee shall be $25.00 and $15.00, respectively.

§14.677(5) Psychologist certification; qualifications of applicant; fees.] Sec. 5. Except as provided in this act, every applicant for certification as a psychologist shall meet the following requirements in addition to those specified in section [3]

(1) Be duly graduated with a doctoral degree in psychology or its equivalent from a reputable institution generally so recognized at the time of granting such degree.

(2) Have completed at least 1 year of supervised professional experience acceptable to the superintendent following the granting of the doctoral degree or such predoctoral experience as may be acceptable to the superintendent.

(3) Within the discretion of the superintendent, have passed an examination to assure his professional competence.

(4) Have not failed such an examination within the 6 months next preceding the date of the examination.

(5) Have paid a certificate fee and, where an examination is required, an examination fee. The examination fee and the certificate fee shall be $20.00 and $15.00, respectively.

§14.677(6) Psychological examiner or technician certification; qualifications of applicant; fees.] Sec. 6. Except as provided in this act, every applicant for certification as a psychological examiner or technician shall meet the following requirements in addition to those specified in section 3:

(1) Be duly graduated with a master's degree in psychology or its equivalent from a reputable institution generally so recognized at the time of granting such degree.

(2) Have completed at least 1 year of supervised professional experience acceptable to the superintendent either before or after the granting of the master's degree.

(3) Within the discretion of the superintendent, have passed an examination to assure his professional competence.

(4) Have not failed such an examination within the 6 months next preceding the date of the examination.

(5) Have paid a certificate fee and, where an examination is required, an examination fee. The examination fee and the certificate fee shall be $15.00 and $10.00, respectively.

§14.677(7) Professional experience requirement; advance approval; examination; crediting.] Sec. 7. Any person desiring to fulfill the supervised professional experience requirement for certification under the provisions of this act may apply to the superintendent for advance approval of the situation in which he intends to gain his supervised professional

experience. Prior to approval the superintendent may require an examination to establish the educational qualifications of the applicant. Experience gained in an approved situation shall be credited toward the supervised professional experrequirements of this act. The superintendent may revoke his approval at any time, but experience gained by an applicant up to the time that notice of the superintendent's revocation of approval shall have been mailed to him by registered or certified mail at his last known address, shall be credited toward the supervised professional experience requirement.

§14.677(8) Certification without examination, conditions; limitation; reciprocity; educational requirements, modification.] Sec. 8. (1) For a period of 2 years after the effective date of this act, the superintendent may certify, with or without examination as consulting psychologists, psychologists and psychological examiners or technicians, any person:

(a) Who meets the requirements of subdivisions (1), (2) and (3) of section 3.

(b) Who by the quality and duration of his experience is judged by the superintendent to have qualifications equivalent to those offered by the educational requirements of the provisions of this act governing certification at the various levels.

(c) Who has been engaged in full-time psychological work at the appropriate level for at least 5 years within the 10-year period next preceding the effective date of this act.

(d) Who pays the certificate fees required under sections 3, 4 or 6 of this act.

[(e) Any applicant denied certification under this section shall upon written request be afforded a hearing as provided for under section 10 of this act.]

(2) When an applicant for certification under this act is a person whose academic preparation and field of practice represents a joint contribution of psychology and some other academic discipline, the designated academic degree in an allied field shall be accepted as fulfilling the educational requirement of certification, if the applicant's graduate training includes a substantial amount of psychology. The examination for applicants in such categories shall be prepared and evaluated by a committee which shall include at least 1 qualified representative of the related discipline, who shall be designated by the Superintendent.

§14.677(8.1) Certification of licensees from other states.] Sec. 8a. The supetintendent may certify, with or without examination, at any of the 3 levels of competence specified in this act any person who is duly licensed or certified by a board of another state under similar conditions if such state grants reciprocal certification or licensing to psychologists certified in this state, or who has been granted a diploma by the American board of examiners in professional psychology, incorporated, if the person:

(a) Meets the requirements of subdivisions (1), (2) and (3) of section 3.

(b) Produces evidence satisfactory to the superintendent that he has such experience, education and ability as would qualify him for certification at the level for which certification is sought.

(c) Pays the certificate fees required under sections 4, 5 or 6 of this act.

§14.677(9) Certification renewal fees, disposition; suspension for nonpayment; reinstatement; revocation of certification.] Sec. 9. (1) All persons certified under the provisions

of this act shall pay to the superintendent, on or before December 31 of the year in which they are certified and on or before December 31 of each year thereafter, an annual certification renewal fee of $25.00 for certified consulting psychologists and $15.00 for certified psychologists and certified psychological examiners or technicians. Upon receipt of the fee, the superintendent shall issue an annual fee certificate.

All fees and other monies received by the superintendent of public instruction under this act shall be promptly forwarded to the state treasurer and credited to the general fund and shall be deposited by him in the state treasury to be disbursed in such manner and for such purposes as are provided by law.

(2) Any psychologist certified under this act who fails to pay the annual fee within 30 days of the due date shall be sent a written notice by certified mail to his business address last recorded with the superintendent. If the fee is not paid within 30 days after the notice, the psychologist shall be suspended automatically from certification. He shall not be suspended if he is on active duty as a member of the armed services.

(3) A psychologist suspended for nonpayment of the annual fee may be reinstated without examination if:

(a) He pays the fee for the current period and a penalty fee equal in amount to the annual fee.

(b) The time elapsing between suspension and the application for renewal does not exceed 2 years.

(c) He has not violated any of the provisions of this act.

(4) If a psychologist does not apply for reinstatement within 2 years after he has been suspended, his certification shall be automatically revoked.

§14,677(10) Withholding, revocation or suspension of certificate, grounds.] Sec. 10. The superintendent may withhold, revoke or suspend any certificate issued under the provisions of this act, after giving reasonable notice and opportunity to be heard, to any person who:

(1) Becomes unfit or incompetent to practice psychology by reason of:

(a) Acts of gross immorality;

(b) Habitual intoxication;

(c) Habitual use of narcotics of habit-forming drugs;

(d) Mental illness; or

(e) Negligent or wrongful actions in the performance of his duties.

(2) Is convicted of a felony or any other crime involving moral turpitude in the courts of this or any other state of the United States.

(3) Commits fraud or deception in obtaining a certificate under the provisions of this act.

(4) Uses a certificate under a false or assumed name, or impersonates another psychologist of a like or different name, certified under the provisions of this act.

(5) Violates any of the provisions of this act.

(6) Is guilty of dishonorable or unprofessional conduct.

§14.677(11) Titles; limitations on use.] Sec. 11. No person may use the titles, "certified consulting psychologist", "certified psychological technician" unless he has a certificate specifying him to be such under the provisions of this act. Certified psychological examiners or technicians may use the title "certified psychological assistant" in any case where they are permitted to use their certification titles under the provisions of this act.

§14.677(12) Advertising or misrepresentation as psychologist; prohibition.] Sec. 12. No person, other than an active certified consulting psychologist, may advertise or represent himself to the public in any way which will lead the public to believe that he is a psychologist or that he is rendering or offering to render psychological services. A person is so advertising or representing himself within the meaning of this section if:

(a) He uses or allows to be used in describing himself or his services in any kind of advertising or representation such terms as, by way of illustration but not of limitation, psychologist and psychological, psychoconsultant and psychoconsultation, psychotechnician and psychotechnical, psychometrician and psychometric, psychophysicist and psychophysical; and

(b) In connection with such advertising or representation, he renders or offers to render services for or in expectation of a fee or anything of value.

§14.677(13) Corporation or entity representing itself as rendering psychological services, condition.] Sec. 13. No corporation or other legal entity other than a recognized hospital, school, college or university or a subdivision of the federal, state or local government, or a charitable, voluntary or nonprofit organization serving benevolent and charitable purposes, may advertise or represent itself to the public in any way which will lead the public to believe that it is rendering or offering to render psychological services to the public unless such services are performed by or under the immediate supervision of a certified consulting psychologist. A corporation or other legal entity is so advertising or representing itself within the meaning of this section if:

(a) It uses or allows to be used in describing itself or its services in any kind of advertising or representation such terms as, by way of illustration but not of limitation, psychological, psychoconsultation, psychotechnical, psychometric or psychophysical; and

(b) In connection with such advertising or representation, it renders or offers to render services for or in expectation of a fee for anything of value.

§14.677(14) Permissible uses of technical terms and titles.] Sec. 14. (1) Any person may use the terms specified in section 12 in connection with any publication or address before public or private groups, if the publication or address is not used as a means to procure clients or patients for the purpose of rendering services to them on an individual basis.

(2) A person who is an employee of another person, corporation or other legal entity, may use such terms within the scope of his employment in respect to [services] rendered to his employer or to fellow employees so long as the employment does not involve relationships with or services rendered to persons who are not employees or potential employees of the employer.

(3) An employee of a recognized hospital, school, college or university or of any government, federal, state or local, or or any charitable, voluntary or nonprofit organization serving benevolent and charitable purposes, who has an employment title which would come within the prohibition of this act, may use his employment title in conjunction with services performed within the scope of his employment even though such employee is not certified under this act.

(4) A psychologist who is not a resident of the state, but who is duly licensed or certified by a board of the state, but which grants reciprocal certification or licensing under simi-

lar conditions to psychologists certified in this state, may offer professional services in this state for not more than 30 days in any calendar year without violating the provisions of this act. However, such persons shall be responsible for reporting to the superintendent the nature and extent of their of their practice if it exceeds 5 days within any calendar year.

(5) Any active certified psychological examiner or technician or certified psychologist may use his certification title only in conjunction with services rendered under the immediate supervision of an active certified consulting psychologist.

(6) Active certified psychologists and certified psychological examiners or technicians may use their certification titles only:

(a) In conjunction with services rendered in obtaining the supervised professional experience required for certification at the next higher level of competence under the provisions of this act, if they are registered under the provisions of Section [7] of this act; and

(b) In the situations described in subsections (1), (2), (3) and (4) of this section.

§14.677(15) Use of psychological tests.] Sec. 15. Nothing in this act shall be construed as restricting the right of any person, corporation or other legal entity to use tools, tests, instruments or techniques usually denominated "psychological" so long as such person, corporation or other legal entity does not advertise or represent himself or itself to the public in a manner prohibited by this act.

§14.677(16) Violation penalty.] Sec. 16. Any person violating this act is guilty of a misdemeanor.

§14.677(17) Practice of medicine; effect of act upon.] Sec. 17. (a) Nothing in this act shall restrict the rights of persons licensed to practice medicine as defined under the laws of this state.

(b) No person certified under this act shall engage in the practice of medicine, including psychiatry ♦ as defined under the laws of this state.

§14.677(18) Certified psychologist-client privilege; waiver.] Sec. 18. No psychologist certified under the provisions of this act shall be compelled to disclose any information which he acquires from persons consulting him in his professional capacity and which information was necessary to enable him to render services in his professional capacity to such persons. Any information may be disclosed with the consent of the person so confiding if the person is 21 years of age or older or if the person is a minor, with the consent of his parent or guardian. After the decease of the person in a contest upon the question of admitting the will of such person to probate, any or all of the heirs at law of such person, whether proponents or contestants of his will, and the personal representative of such deceased person, may waive the privilege hereinbefore created.

§14.677(19) Citation of act.] Sec. 19. This act shall be known and may be cited as the "psychologist registration act".

Questions Presented

1. Is the Michigan Statute, Act 257, P.A. 1959, as amended, (being Sec. 338.1001, C.L. 1948, et. seq.) which requires certification by the Superintendent of Public Instruction of the

State of Michigan as a prerequisite to holding oneself out to the public as a consulting psychologist and charging a fee for services rendered as such, repugnant to and a violation of the Fourteenth Amendment to the Constitution of the United States in that said Act fails to provide adequate standards, thereby vesting in a single individual arbitrary and capricious powers and as being unconstitutionally vague and indefinite?

2. Is the said Michigan Statute as applied by the Superintendent of Public Instruction of the State of Michigan against the appellant, deliberately and arbitrarily refusing certification to the appellant, repugnant to and a violation of the Fourteenth Amendment to the Constitution of the United States?

Statement of The Case

The Bill of Complaint, Division I, sought a decree declaring that Act 257, PA 1959, as amended, known as the Psychologist Registration Act, being CLS 1961 Dec. 338.1001, et seq; MSA 1965 Cum. Supp. 14.677 (1) et seq, was unconstitutional. Division II of the Bill asked that if the court found the Act constitutional, the Court decree that defendant certify plaintiff as consulting psychologist under Section 8 of the amended act.

The Bill alleged that plaintiff is a psychologist of long years of training and experience that he was engaged in practice before passage of the Act; and that his livelihood was obtained from the rendition of consulting psychological services.

It is alleged that plaintiff's application for certification was denied by the defendant placing plaintiff under the threat of of prosecution.

Division II alleged that on December 13, 1960, appellant first applied to appellee for certification under Sec. 8 of the Act. The application was denied without hearing. Subsequently, Sec. 8 was amended to provide for hearing and thereafter, on June 8, 1961, appellant sought and was given a hearing. Appellee requested appellant to submit further evidence of his asserted qualifications. Additional data was furnished and on January 29, 1962 appellee denied appellant's application, which action it is contended was arbitrary and capricious and constituted an abuse of discretion, should Act 257 be declared constitutional, and for the further reason that the Superintendent of Public Instruction made no findings of fact nor gave reasons for denying the appellant's application for certification.

Upon reading and filing the Bill, an Order to Show Cause with a temporary restraining Order was granted. Motion to dismiss was filed. (R 19-20).

The Court, thereafter, on December 21, 1962, mistakenly rendered its opinion on the merits of the lawsuit and dismissed said suit for the reason that the Act was constitutional and for the reason that the Circuit Court could not mandamus a state officer. (R 54-57).

On January 3, 1963, a Motion for Rehearing was filed by the appellant pointing out to the Court that the defendant and appellee had appeared before the Court on a special appearance only and that said special appearance and Motion to Dismiss prevented the Court from entering a judgment on the Merits, (R 59) and was bolstered by further motion to vacate the judgment entered thereon filed on January 25, 1963, (R 68-69) basing said motion on Michigan General Court Rule No. 528,

Sub Section 1 mistake, inadvertance, surprise or excusable neglect; etc. . . . (R 68-69)

Rule 528 Relief from Judgement or Order

1. Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time of its own initiative or on the motion of the party and after such notice, if any, as the Court orders. During the pendency of an appeal such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

On the same date, January 25, 1963, the Court entered its order staying the judgment and restored the Temporary Restraining Order pending a hearing thereon. (R-82).

On March 13, 1963, the trial court denied the appellant's request to vacate the judgment with reference to Division II of the Bill of Complaint, but reinstated Division I of the Bill of Complaint and vacated that part of the judgment without prejudice to the defendant and appellee, however, to the filing of a Motion for Summary Judgment and at the same time continued the Temporary Restraining Order. (R-90-91)

On March 13, 1963, defendant and appellee filed his Motion for Summary Judgment reciting that the Bill of Complaint failed to state a cause of action, the Act was constitutional, and that said statute was reasonably related to the preservation and protection of the public health and welfare.(R92, 93, 94)

On April 29, 1963, plaintiff and appellant filed his answer to the Motion for Summary Judgment as well as his Motion to File Amended Pleadings with affidavit in support thereof. (R 99-102)

Said Motion was filed pursuant to Rule 117, sub-sec. . 3, providing that each party shall be given the opportunity to amend his pleadings as provided by Rule 119 unless the evidence before the Court shows the amendment would not be justified. (R103). Rule 118 provides in Sub-Sec. : 1 that leave shall be freely given when justice so requires.

Said amended Complaint was filed with the Court April 29, 1963, and removed the previous objection to the requesting of a mandamus of a state officer and in lieu thereof, sought a hearing by the Circuit Court based on the abuse of discretion by the defendant and appellee, and asked for the certification by the Court itself. (R 106).

Briefs were filed and the Court entered its final judgment on the matter on July 16, 1965,

1. Denying plaintiff and appellant's Motion to File Amended Pleadings.

2. Granting defendant and appellee's Motion for Summary Judgment.

3. Dismissing plaintiff and appellant's Bill of Complaint, Division I thereof, with prejudice and without costs.

4. Granting an automatic stay of proceedings for 20 days. (R 128).

It is important to note that this case was decided merely upon the pleadings and not upon evidence. In such case, the

Circuit Court and the Court of Appeals were bound to take the appellant's allegations as true. Sommers v. City of Flint, 355 Mich. 655, 661.

Appellant appealed the judgment of the lower court to the Court of Appeals of Michigan and raised three issues on appeal:

1. Does Act 257, 1959, as amended, violate Art. V, Sec. 21 of the Constitution of 1908 in that the title of said Act embraces matters other than those expressed in the title thereof and includes matters not germane to the object expressed in the title?

2. Does Act 257, 1959, violate Art. II, Secs. 1, 2; Art. IV, Sec. 2 of the Michigan Constitution, and the Fourteenth Amendment of the United States Constitution?

3. Did the trial court err and abuse its discretion in failing to allow the appellant to amend his complaint in violation of General Court Rules of 1963 and then, in part, base its decision on a failure in the pleadings which the Amendment would have cured?

The Court of Appeals affirmed the decision of the lower court. In its Decision of November 9, 1966, it found the Act a "proper use of the police powers of the state." The state, in the public interest, may provide for the regulation and certification of professions and may delegate such functions to a state administrative agency . . . when the Act is read as a whole, the legislative policy is apparent from the reasonably prescribed standards seen within the Act . . . The fact that the statute could have been more detailed does not affect its clear constitutionality."

It further found that appellant's attempt to appeal the deci-

sion of the administrative agency of his qualifications was untimely and thus properly dismissed by the Circuit Court.

The appellant sought certification under Section 8 of the Act, the so-called "grandfather clause." The time permitted for certification under that section has expired and therefore, appellant cannot file for re-certification now.

On January 16, 1967, the Supreme Court of the State of Michigan issued its order denying leave to appeal and on March 14, 1967 issued its order denying re-hearing.

On May 5, 1967, appellant filed in the Court of Appeals of the State of Michigan a Motion for Stay Pending Appeal to the United States Supreme Court. On said date the Court of Appeals issued its order staying proceedings for a period of ten days conditioned on the appellant's filing an application for a stay with the Supreme Court of the United States or a Justice thereof within ten days and further conditioned on the appellant's noting an appeal to the Supreme Court of the United States within ten days.

On May 5, 1967, appellant also filed Notice of Appeal to the Supreme Court of the United States with the court of Appeals of the State of Michigan and on May 10, 1967, filed a similar notice of appeal in the Supreme Court of the State of Michigan and in the Circuit Court for the County of Wayne, State of Michigan.

On May 12, 1967, appellant filed with the Court of Appeals of the State of Michigan, a Motion for an extension of the Stay Order granted by that Court on May 5, 1967.

The Court of Appeals of the State of Michigan entered its order granting appellant's Motion for Immediate Consideration

and extending its Stay Order until June 15, 1967, or until such time as appellant's petition for stay filed with the United States Supreme Court was determined.

Appellant's Application for a Stay of the final Judgement of the Court of Appeals of Michigan was presented to Mr. Justice Stewart who returned the application papers with the following endorsement:

"Application denied.
Potter Stewart
May 24, 1967."

The appellant contended at every stage of the proceedings that Act 257 is repugnant to the Constitution of the United States in that it violates the Fourteenth Amendment of the Constitution. The constitutional questions were raised in the trial court in the Bill of Complaint filed by the appellant and in the briefs filed in the trial court. The question was also raised in the Court of Appeals of the State of Michigan and in the briefs filed in that Court. The constitutional objections were considered but rejected both by the trial court and by the Court of Appeals of the State of Michigan.

The Federal Questions are Substantial

No court, state or federal, has held that a state legislature has unlimited power or authority even with respect to such subjects as the health and welfare of the people of the state. The primary responsibility rests with the state legislature, but the courts have a solemn and inescapable duty, in an appropriate case, of deciding whether state action is so arbitrary and unreasonable as to be unconstitutional. England v. Louisiana State Board of Medical Examiners, 263 F. 2d 661, 663.

"A statute which makes the peaceful enjoyment of freedoms guaranteed by the federal constitution contingent upon the uncontrolled will of an official, as by refusing a license which may be granted or witheld in his discretion, is unconstitutional." Staub v. City of Baxley, 355 U.S. 313.

It is the contention of the appellant that Act 257 is repugnant to the Constitution because it is arbitrary and unreasonable on its face and makes certification contingent upon the will of a single official allowing him to certify or not at his discretion without adequate standards to guide him and, further, that Act 257 was so applied against the appellant in an arbitrary and unreasonable manner thus denying to him constitutionally protected rights while others so situated were certified under the same provisions of Act 257.

While in recent decisions this Court has refused to disturb state court decisions upholding the regulation and practice of the healing arts, appellant stresses that in none of these cases did the pleadings or evidence make a clear showing that the Act was arbitrary or unreasonable on its face or in its application. The allegations of the appellant in this case are uncontroverted and demonstrate beyond doubt that the Act does confer arbitrary and unreasonable powers on one official and that official did so apply the Act against the appellant in an arbitrary and unreasonable manner.

In the face of that showing the Court of Appeals of the State of Michigan has found the Act "a proper use of the police powers of the State."

This Court must decide whether the law has evolved to such an extent that a state, in the exercise of its police power to regulate the field of the healing arts, may grant to a single

individual sole discretion to determine the standards for certification, require certain qualifications of one applicant but not another, and the power to refuse certification even though the standards and the qualifications are met. For only if the law has reached this point can the decision of the Court of Appeals of Michigan regarding the constitutionality of Act 257 be upheld.

The appellant contends that the Act is so vague and uncertain on its face that the Superintendent of Public Instruction charged with its enforcement has within his sole discretion the power to set standards other than those contained in the Act and, further appellant contends the pleadings are uncontroverted in showing that arbitrary standards were so set and applied.

In view of the recent propensity of state legislatures to extend their licensing powers to more and more professions, trades and businesses by a multitude of schemes and regulatory systems it is vital to the jurisprudence of this nation that this Court clearly set forth the limits beyond which a state, even in the exercise of so fundamental a power as the police power, may not go in interfering with constitutionally protected rights of the individual.

The importance of this point was eloquently stressed by Mr. Justice Brennan, University of Detroit, 44 Journal of Urban Law 11, 20:

> "To a growing extent economic existence now depends on less certain relationships with government-licenses, employment contracts, unemployment benefits, welfare, and the like. Government participation in the economic existence of individuals is pervasive and deep. Adminis-

trative matters and other dealings with government are at the epicenter of the exploding law. We turn to government and to the law for controls which would never have been expected or tolerated before this century, when a man's answer to economic oppression or difficulty was to move 200 miles west. Problems of the relationship of the citizen with government have therefore multiplied and thus have emerged some of the most important constitutional issues of our day. As government acts even more deeply upon those areas of our lives once marked "private" there is an even greater need to see that individual rights are not curtailed or cheapened in the interest of what may temporarily appear to be the "public good." To put this another way, the possibilities for collision between government activity and individual rights will increase as the power of government itself expands, and this growth in turn heightens the need for constant vigilance at such collision points. If free government is to endure, those who govern must recognize human dignity and accept the enforcement of constitutional limitations on their power conceived by the Framers to be necessary to preserve that dignity and the air of freedom which is our proudest heritage. Such recognition will not come from a technical understanding of the organs of government, or the new forms of wealth they administer. It requires something different, something deeper - - - a perspective which comes from personal confrontation with the well-springs of our society. Solutions of constitutional questions from that perspective have become the great challenge of our time and of the years that lie ahead."

Beginning with the case of Dent v. State of West Virginia, 129 U.S. 114, this Court has examined the rights of the states to regulate the practice of medicine and related healing arts. It is well settled that the police power of the states does extend to such regulation. Louisiana State Board of Medical Examiners v. Fife, 162 La. 681, affirmed 274 U.S. 720; Dantzler v. Callison, 94 S.E. 2d 177, appeal dismissed, 352 U.S. 939; Stuart v. Wilson, 211 F. Supp. 700, motion to affirm granted, 371 U.S. 576.

Nevertheless, acts regulating the healing arts do not enjoy immunity from constitutional attack. This Court has held that such acts do not meet constitutional tests when . . .

". . . they have no relation to such calling or profession . . ." Dent v. West Virginia, 129 U.S. 114.

". . . are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily . . ." Watson v. Maryland, 218 U.S. 173.

". . . are arbitrary or unreasonable attempts to exercise the authority vested in it (legislature) in the public interest . . ." Graves v. Minnesota, 272 U.S. 425.

The allegations of the appelant place the Act on its face and in its application to the appellant squarely within the above prohibitions.

Appellant contends that Act 257 is void on its face because it fails to set ascertainable standards for licensing of psychologists which the Superintendent is to follow, and thus delegates to him legislative powers whereby he may determine some of the standards required for licensing.

In the lower courts appellee claimed that the Act is a valid and reasonable exercise of the legislative power in the preservation of the public helath and welfare. Appellant does not deny that the State may, in the exercise of its police powers, prescribe rules and regulations and enact laws to accomplish the purposes encompassed in the police power.

This is pointed out by the Michigan Supreme Court in Fowler v. Board of Registration, 374 Mich. 254, wherein the Court states:

> "That the State through the legislature may provide for the licensing and regulation of professions, like the healing arts in which the public interest is very great, is not open to question . . . nor is it open to question that the legislature may delegate such regulatory functions to a State administrative agency . . ."

The next statement of the Court, Appellant submits, sets forth the key issue here:

> ". . . subject, of course, to the general restrictions upon any delegation of legislative power that 'the exact (legislative) policy is clearly made apparent'. . . . by means of 'legislatively prescribed policy standards'," Ibid, 257.

As in that case, Appellant contends that Act 257, 1959, must be stricken down as an improper delegation of legislative power. Appellant bases this contention on the very face of the wording which appears in the Act.

Specifically, Appellant objects to the following provisions:

Sec. 4 (1) requiring that an applicant be duly granted with a doctoral degree in psychology, or its equivalent, from a reputable institution generally so recognized.

Sec. 4 (2) requiring that an applicant have at least five years of professional experience acceptable to the Superintendent, and the further reference to the "or equivalent" phrase objected to above in describing the degree requirements.

Sec. 4 (3) requiring the passing of an examination in his specialty and in such other fields of psychology as are deemed necessary by the Superintendent to assure his professional competence.

The same objections are made to identical provisions in Sections 5 and 6 of the act which prescribes prerequisites for licensing as a psychologist and psychological examiner or technician respectively.

Sec. 8 (1) which provides that the Superintendent may certify one who by the quality and duration of his experience is judged by the Superintendent to have qualifications equivalent to those offered by the educational requirements of the provisions of the Act.

Section 8 (1) thereby gives the Superintendent the right to determine the equivalent of equivalents. How much further can the legislature go in abrogating its legislative powers?

Appellant contends that the granting of power to certify and determine the qualifications of applicants fails sufficiently to fix standards to be applied and delegates the application of the statute without sufficient limitations on the Superintendent's discretion.

These points were ruled on in the case of Husband v. Cassel, 130 So. 2d 69.

The Florida statute, F.S. Chapter 490, FSA, provided for certification of psychologists. The statute provided that applicants must pass an examination in psychology, as is required in Sec. 4 (3) of Act 257. The Florida statute also provided that the applicant must:

"(c) (have) received a degree of doctor of philosophy with a major in psychology from a university approved by the board as maintaining satisfactory standards or an equivalent degree in a field of psychology from a similarly approved university. . ."

As to the wording of the statute requiring an examination, the court said:

"An examination of this section reveals that the only limitation imposed by the legislature upon the board with reference to the examination to be given is that it must be on the field of psychology. This subject is extremely broad and the legislature has completely failed to define or delimit the field either expressly or by implication. As a consequence the board has within its sole discretion and judgement to determine the nature and scope of the field to be encompassed in the examination determining applicants' qualifications as psychologists. The board is thus authorized to examine without safeguards in the form of limitations." Husband v. Cassel, supra.

As to Section (c) quoted above, the court said:

"(Section c) is objectionable for the same reasons . . All applicants according to this former section are required to obtain a degree of Doctor of Philosophy with a major in Psychology. This degree must be obtained from a univer-

sity approved by the board. The legislature has failed to provide any standards to guide the board in its approval of a university. In fact the board is empowered to determine what constitutes an equivalent degree in the field of psychology without limitations imposed by the legislature. It is thus evident that the board has unbridled discretion to determine all qualifications of applicants as well as all requirements for the establishment of their competency in order to be certified as psychologists and to practice that profession in the state of Florida." Ibid. (emphasis supplied)

While holding that the legislature may lay down policies and establish standards while leaving to selected ministerial agencies the making of subordinate rules within prescribed limits, the Court held it may not delegate its legislative powers and found that it had done so here and had failed to set required standards, and, therefore, declared the statute unconstitutional.

As in the Florida case, the Michigan Legislature has laid down no safeguards or limitations on the examination required by Sec. 4 (3). Sec. 4 (1), the degree requirement, fails to set any standards to guide the Superintendent in his determination of what constitutes a reputable institution. Sec. 4 (2) sets no limits or safeguards as to what constitutes experience and leaves this determination to the unbridled discretion of the Superintendent. Likewise, Sec 8 (1) provides that the Superintendent has sole discretion without any reference to any limits or standards to judge the experience of applicants.

It is thus clear that the decision of the Court of Appeals of Michigan is clearly erroneous.

Act 257 also allows the Superintendent to set standards other than those provided in the Act and he did require such standards.

As appellant's Complaint states, and for the purposes of a Motion to Dismiss or for Summary Judgment allegations well-pleaded in the Complaint must be taken as true, the superintendent required appellant to comply with the following conditions.

(a) Have two competent psychologists, preferably certified under said Act, examine plaintiff's records.

(b) That the appellant furnish an additional endorsement relative to appellant's work, preferably from a certified psychologist or psychiatrist recognized by the American Board of Psychiatry.

Appellant did meet all these requirements, Complaint Div. II, Page 10, (R 18, 19) on the basis of appellee's indication that upon compliance with said conditions that plaintiff would be qualified for certification, Complaint, Div. II, Para. 9. (R 18, 19).

The Act does not set these standards and there is no indication that the Superintendent in administering this Act is required to make these demands upon any applicant. He may make them or not as he sees fit. There is no showing that he made these demands of everyone seeking his certification. Indeed, under the provisions of the Act he was not required to do so.

It is apparent that the Superintendent, in certifying under Section 8, may make more stringent demands on one applicant than upon another.

Appellant contends that by allowing the administration of the Act to operate unequally that is void.

As to a statute fair on its face which is capable of inequality in its administration appellant cites the discussion to this point in Yick Wo v. Hopkins, 118 U.S. 356, 370-374. In discussing with approval an earlier case of the Maryland Court of Appeals Mr. Justice Matthews reviews that decision.

> "The court holding the opinion that 'there may be a case in which an ordinanace passed under grant of power like those we have cited, is so clearly unreasonable, so arbitrary, oppresive, or partial, as to raise the presumption that the Legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority,' it proceeds to speak... as follows: 'It does not profess to prescribe regulations . . . But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam... engine to cease to do so... But if he should not choose to do this, but only act in particular cases, there is nothing in the ordinance to control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. Is is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business against whom they are directed, while others, from whom they are witheld, may be actually benefitted by what is thus done to their neighbors; and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives

easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being brought under cover of such power, for that becomes apparent to everyone who gives the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.'

"This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance as to its necessary tendency and ultimate actual operation."

Further in the same opinion the Supreme Court stated:

"Though the law itself may be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Ibid.

It is contended by appellant that the pleadings establish that this Act is within that class. The record shows that appellant has complied with every requisite deemed by the law, or the Superintendent charged with its administration, necessary for the protection of the public health and welfare. No reason, whatever, except the will of the Superintendent, is assigned why the appellant should not be certified to continue the practice of his profession. And while the certification is witheld from him, others are certified under this same Section 8 and are permitted to carry on the same occupation

under similar circumstances. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion is that none exists. The discrimination is, therefore, illegal and the Superintendent who enforces it indulges in a denial of due process and equal protection of the laws in violation of the Fourteenth Amendment of the Constitution.

Conclusion.

For the reasons stated, the questions presented by this appeal are substantial and are of broad public importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

S. JAMES CLARKSON
Attorney for Appellant,
19666 W. Ten Mile
Southfield, Michigan
353-6444

October 1966

APPENDIX

Unreported Wayne County Circuit Court Opinion

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

WESLEY G. NELLES,

Plaintiff,

vs.

No. 620-156

LYNN M. BARTLETT,
Superintendent of Public
Instruction of the State
of Michigan,

Defendant.

OPINION

This cause is before the Court by way of motion to dismiss filed by the defendants.

The facts are set forth briefly as follows: The plaintiff is a psychologist of many years training and experience, engaged in the practice of psychology prior to the passage of subject act, and his livelihood is obtained by the rendition of consulting psychological services.

Act 257, Public Acts 1959 (1) as amended, known as the Psychologists' Registration Act, being MSA 1961 Cum Supp Section 14.677 (1) et seq. requires plaintiff to be certified to continue his consulting psychological services.

On December 13, 1960, plaintiff first applied to defendant for a certification. The application was denied. Subsequently, on June 8, 1961, defendant requested plaintiff to submit further evidence of his asserted qualifications. On January 29, 1962, defendant denied plaintiff's application.

It appears to the Court the main question for determination

here is whether the subject act as amended is unconstitutional. In trying to determine whether such act is constitutional or not we must start with the premise: ALR Digest Courts II 74, 80 Evid. II 104 (1).

> The adequacy of a legislative scheme is for the legislature to determine; a strong presumption in favor of Constitutionality exists, and a reasonable doubt in its favor is enough to sustain it. Am. Jur. Courts II 202-206 Evid. II 174.

With the preceding in mind, we then can analyze the act as to its constitutionality. The first point the plaintiff makes is that such act violates Article XI, Sec. 2 of the Michigan Constitution by delegating to such officer powers to regulate, effectuate and enforce objects unrelated to his office. Upon reading the Article it appears that such Article in no way makes germaneness a standard to limit the powers or duties that the legislature may impose upon such officer. Further, even if germaneness was a standard it would seem that, as superintendent of public instruction, he would be the proper officer to handle such duties.

As to whether the plaintiff is deprived of due process of law due to such Article, it is stated in 313 Mich. 376:

> "The conferring of discretionary power upon administrative boards to grant or withold permission to carry on a trade or business, which is the proper subject of regulation within the police power of the state is not violative of the rights secured by the process clause."

The Court further states:

> "A statute which empowers an administrative officer in the exercise of a reasonable discretion to withold a license from such a person as he may find unsuitable and

in the exercise of a similar discretion to revoke a license already granted to a person who may be unfit does not constitute delegation of a legislative power."

From what the Court has stated above it appears that such Act was not vague or indefinite but, on the contrary, the exact policy was clearly laid out, and also such delegation of authority appears to be proper.

The plaintiff's next contention is that the said act embraces more than one object and that the title of such act fails to set forth an expressed object embraced within said act.

The Michigan Supreme Court at 136 Mich. 451 has stated:

"The requirements that no law shall embrace more than one object which shall be expressed in its title is not to be given a narrow or strained construction, and, if the provisions of the statute are germane to the subject expressed in the title, the section is sufficiently complied with."

It was stated further in 341 Mich. 654:

"Any provisions germane to the subject expressed in the title of an act may properly be concluded in the act or added thereto by amendment, and it is sufficient if the title fairly expresses the subject or is sufficiently comprehensive to include the several provisions relating to or connected with that subject."

In examining the subject statute it appears that it has sufficiently fulfilled the requirements of Article V, Sec. 21 of the Michigan Constitution, and, therefore, such argument as put forth by the plaintiff is not valid.

As to plaintiff's portion of their prayer where they requested this Court to order and decree defendant to certify plain-

tiff as a consulting psychologist, it is well recognized that the Circuit Court does not have such power of mandamus..

> "No Circuit Court shall have jurisdiction to issue a writ of mandamus against any state officer." (CL 1948 II 636.3 [Statutes Annotated li 27.2230]

In 336 Mich. 209 it is stated as follows:

> "No litigant can mandamus a state officer in the Circuit Court simply by using the term injunction instead of mandamus when it is the latter remedy he seeks."

Proceeding with the presumption that all legislative enactments are presumptively constitutional, and, since such subject act appears to be a proper exercise of the police power and a proper delegation of authority by the legislature to the defendant, the Court concludes the defendant's motion to dismiss is hereby granted, and an order may be prepared and submitted in accordance with the above.

JAMES N. CANHAM
Circuit Judge

APPENDIX
First Judgment of Wayne County Circuit Court

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
GENERAL CIVIL

WESLEY G. NELLES,

Plaintiff,

vs.

No. 620-156

LYNN M. BARTLETT, Superintendent of Public Instruction of the State of Michigan,

Defendant.

JUDGMENT

At a session of said Court held in the City-County Building in the City of Detroit, Wayne County, Michigan on this 11th day of January, A.D. 1963.

PRESENT: James N. Canham, Circuit Judge

This cause having come before the Court upon defendant's motion to dismiss the Bill of Complaint, plaintiff having appeared by S. James Clarkson of Moore, Clarkson & Sills, attorneys for plaintiff, and the defendant having appeared by Frank J. Kelley, Attorney General, by Franklin J. Rauner, Assistant Attorney General, oral arguments having been made and the Court being fully advised in the premises;

NOW, THEREFORE, for the reasons set forth in the Opinion of the Court, which is hereby incorporated by reference;

IT IS ORDERED and ADJUDGED that the said motion be and the same is hereby granted;

IT IS FURTHER ORDERED and ADJUDGED that the restraining order heretofore issued in this cause be and the same is hereby vacated and set aside.

IT IS FURTHER ORDERED and ADJUDGED that the Bill of Complaint be and the same is hereby dismissed with prejudice, without costs, however, public questions being at issue.

(sgd) James N. Canham,
Circuit Judge

APPENDIX

Unreported Wayne County Circuit Court Supplemental Opinion

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

WESLEY G. NELLES,

Plaintiff,

vs.

LYNN M. BARTLETT,
Superintendent of Public Instruction of the State of Michigan,

Defendant.

620-156

SUPPLEMENTAL OPINION

This matter was originally before the court, and through a series of motions and arguments, the court terminated this controversy with an opinion under the date of December 21, 1962, wherein the court granted defendant's motion to dismiss. On March 13, 1963, defendant filed a motion for summary judgement. A considerable delay was involved due to the alleged constitutional question of the Office of Superintendent of Public Instruction, as a result of the constitution of 1963. The court in its opinion of December 21, 1962 concluded as follows:

> "Proceeding with the presumption that all legislative enactments are presumptively constitutional, and since subject act appears to be a proper exercise of the police power, and a proper delegation of authority by the legislature to the defendant, the court concludes the defendant's motion to dismiss is hereby granted."

Supplementing the above paragraph of the court's opinion and all of the other pertinent findings of the court in it's opin-

ion of December 21, 1962, the court concluded as follows:

Following the earlier opinion the plaintiff as more specifically limited his argument to section 8 of the subject statute contending that it is unconstitutional for the reason, that it fails to set standard. It should be observed, first, that if the plaintiff should prevail in such contention, there is no basis for his certification as a psychologist under section 4, 5 and 6. Section 8 is properly reviewable as severable; even if invalid, the remainder of the act stands as a comprehensive plan for certification of psychologists.

The court is unaware of and is not cited to any authority that the legislature is constitutionally obliged to adopt any type of "grandfather" clause in the licensing professionals where the public health and welfare are involved.

Moreover, the court is not persuaded that the standards of section 8 are vague and indefinite. The equating of actual practical experience to formal educational levels is common practice in daily affairs.

The court notes that procedural due process is satisfied and applicant feeling aggrieved by the action of the Superintendent in denying his application for certification has adequate remedy. He may ask for review under the Administrative Act 197, Public Acts of 1952. The Superintendent cannot reject an application arbitrarily, 33 Mich. 508, 512, nor can the court superimpose judgement over the superintendent, but is confined to a determination of whether there was a reasonable ground sustaining the superintendent decision, 360 Mich. 467, 474.

Hence, it is concluded, Section 8 is valid and constitutional; adequate provisions for review thereunder are available to aggrieved applicants.

Defendants motion for a summary judgment is granted and an order may be submitted in accordance thereto.

(sgd) JAMES N. CANHAM
Circuit Judge

APPENDIX
Second Judgment of Wayne County Circuit Court

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GENERAL CIVIL

WESLEY G. NELLES,
Plaintiff,

vs. No. 620-156

LYNN M. BARTLETT,
Superintendent of Public
Instruction of the State
of Michigan,
Defendant.

JUDGMENT

At a session of said court held in the City-County Building in the City of Detroit, Wayne County, Michigan, on July 16, 1965.

PRESENT: Honorable James N. Canham
Circuit Judge

This cause as to Division I of the Bill of Complaint having come before the Court upon plaintiff's motion to file amended pleadings and defendant's motion for summary judg-

ment, plaintiff having appeared by S. James Clarkson, his attorney, defendant having appeared by Frank J. Kelley, Attorney General, by Franklin J. Rauner, Assistant Attorney General, judgement as to Division II of the Bill of Complaint having heretofore been entered, oral argument having been made, briefs having been filed, and the Court being fully advised in the premises;

IT IS ORDERED AND ADJUDGED that plaintiff's Motion to file amended pleadings be and the same is hereby denied;

IT IS ORDERED AND ADJUDGED that defendant's motion for summary judgment be and the same is hereby granted;

IT IS FURTHER ORDERED AND ADJUDGED that the Bill of Complaint (Division I thereof) be and the same is hereby dismissed with prejudice, without costs, however, a public question being at issue; and

IT IS FURTHER ORDERED AND ADJUDGED that the temporary restraining order heretofore restored and continued until the further order of the Court be and the same is hereby vacated and set aside; a Stay of Proceedings of 20 days from the date hereby granted.

(sgd) JAMES N. CANHAM
Circuit Judge.

APPENDIX

Court of Appeals Opinion Appealed From

STATE OF MICHIGAN COURT OF APPEALS
DIVISION 1

WESLEY G. NELLES

Plaintiff Appellant

vs. No. 1194

LYNN M. BARTLETT, Superintendent of Public Instruction of the State of Michigan

Defendant-Appellee

BEFORE: GILLIS P. J. HOLBROOK and McGREGOR. JJ.

McGREGOR, J. – On December 13, 1960, the plaintiff first applied to the Superintendent of Public Instruction, defendant herein for certification as a consulting psychologist under Section 8 of the psychologist registration act (PA 1959, No. 257 [Sta Ann 1959 Cum Supp § 14.677 (8)] which provides for the registration without examination of persons who have experience in practicing psychology equivalent to certain educational requirements specified in other provisions of the act. Plaintiff's application was denied by defendant. The act made no provisions for hearing to determine the eligibility of the applicants for certification under Section 8.

Subsequently, PA 1961, No. 132 (CLS 1961, § 338.1008 [Stat Ann 1963 Cum Supp § 14.677 (8)]), amended section 8 by inserting a paragraph requiring a hearing as provided under section 10 of the act upon written request of any applicant who had been denied certification under section 8. At such a hearing the defendant requested the plaintiff to fur-

nish further evidence of his alleged qualifications. After plaintiff's attempted compliance with this request the defendant again denied certification, on January 29, 1962

On March 15, 1962 the plaintiff in bringing this action in circuit court alleged the psychologist registration act violated certain provisions of the federal and state constitutions that the plaintiff practiced as a consulting psychologist for many years prior to the passage of the act that the defendant denied certification to the plaintiff and demanded as relief an injunction restraining the defendant from interfering with the plaintiff's practice of psychology, a declaration of the unconstitutionality of the act and in the event that the act should be found constitutional an order requiring the defendant to certify plaintiff as a consulting psychologist without examination under section 8 of the act. The circuit court dismissed the complaint on the grounds that the act was constitutional and that the circuit court lacked jurisdiction to mandamus the superintendent of public instruction. (Former CL 1948 § 636.3 [Stat Ann § 27.230] and Revised Judicature Act CLS 1961 § 600.4401 [Stat Ann 1962 Rev § 4401])

The first question is whether the administrative procedures act (CL 1948 § 24.101 et seq [Stat Ann 1961 Rev § 3.560 (21.1) et seq]) applies to the procedure for obtaining a psychologist's certification from the superintendent of public instruction. The answer is found in the first section of the act.

"Sec. 1. For the purposes of this act:

(1) 'Agency' means any state board, commission, department bureau, or officer. . . * * *

(3) 'Contested case' means a proceeding before an agency in which the legal rights, duties or privileges of a of a specific party or specific parties are required by law or constitutional right to be determined after an

"opportunity for an agency hearing" CL 1948 24.101 [Stat Ann 1961 Rev § 3.560 (21.1)]

The state officer entrusted with the administration of the psychologist registration act, the superintendent of public instruction, is an "agency" under the terms of the act. The practice of psychology is a privilege which may be licensed by the state, and a proceeding to obtain such a license is a contested case within the meaning of the language in subsection 3. Therefore, the administrative procedures act applies.

It is provided in section 8 of the administrative procedures act that a judicial review of the actions of state agencies may be had by the filing of an action in the appropriate circuit court within 30 days after personal service or after the mailing of the final decision of said agency. This action cannot be allowed to stand unless there is reason to excuse plaintiff from the customary rule which requires a party to excuse plaintiff from the customary rule which requires a party to exhaust his administrative remedies. Plaintiff's complaint as originally filed, did not even purport to be a petition for review of the administrative decision, but was an outright attack in circumvention of the administrative procedure since the plaintiff asked for an injunction to restrain the defendant from interfering with the plaintiff's practice of psychology and for an order requiring certification of the plaintiff by the defendant. The circuit court lacked authority to issue mandamus against the superintendent of public instruction. Equitable jurisdiction should not be exercised in this case because the plaintiff has or had, an adequate remedy at law which was an appeal under section 8 of the administrative procedures act, which specifically allows the circuit court on appeal to consider and decide the constitutionality of the actions brought up for review. School District of the City of Benton Harbor v. State Tenure Commission (1964). 372 Mich 270. There

would be no reason to excuse the plaintiff herein from exhaustion of his administrative remedies since he found it advantageous to pursue them up to the stage at which the administrative procedures act provided for the intervention of the circuit court. Plaintiff could not be heard to claim that following the proper administrative procedure would result in a delay in the adjudication of his rights.

Even if this action were to be taken as a proceeding for review under section 8 of the act, it was clearly commenced too late to preserve the right to circuit court review. Boster v. County of Wayne (1944), 308 Mich 544. Since the 30-day time limit had long since expired when the plaintiff commenced this action in circuit court, he failed to pursue properly the course of remedies provided by the administrative procedures act. Dismissal, therefore, was proper. Braun v. County of Wayne (1942), 303 Mich 454.

The psychologist registration act, supra, as amended, is a proper use of the police powers of the state. The state, in the public interest, may provide for the regulation and certification of professions and may delegate such regulatory functions to a state administrative agency. Fowler v. Board of Registration of Chiropody (1965), 374 Mich 254. When the act is read as a whole, the legislative policy is apparent from the reasonably prescribed standards seen within the act. People v Babcock (1955), 343 Mich 671. The fact that the statute could have been more detailed does not effect its clear constitutionality.

The judgment of the circuit court is affirmed. No costs are awarded because of the public nature of the questions involved.

APPENDIX

Supreme Court of Michigan Order Denying Leave to Appeal

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 16th day of January, in the year of our Lord one thousand nine hundred and sixty-seven.

Present the Honorable
JOHN R. DETHMERS,
Chief Justice,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
THEODORE SOURIS,
MICHAEL D. O'HARA,
PAUL L. ADAMS,
THOMAS E. BRENNAN,
Associate Justices

WESLEY G. NELLES,
Plaintiff and Appellant

vs 51650

Superintendent of Public Instruction of the State of Michigan
Defendant and Appellee

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, for the reasons that plaintiff-appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous. This determination makes moot the motion for an injunction and restraining order pending appeal.

STATE OF MICHIGAN--ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of the said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 16th day of January in the year of our Lord one thousand nine hundred and sixty-seven.

(sgd) Donald F. Winters,
Clerk.

APPENDIX

Supreme Court of Michigan Order Denying Rehearing

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capital, in the City of Lansing, on the 14th day of March, in the year of our Lord one thousand nine hundred and sixty-seven.

Present the Honorable
JOHN R. DETHMERS,
Chief Justice,
HARRY F. KELLY,
EUGENE F. BLACK,
THOMAS M. KAVANAGH,
THEODORE SOURIS,
MICHAEL D. O'HARA,
PAUL L. ADAMS,
THOMAS E. BRENNAN,
Associate Justices

WESLEY G. NELLES,
Plaintiff and Appellant

vs 51650

Superintendent of Public Instruction

On order of the Court (Kavanagh, J., not participating). the motion for rehearing is considered, and the same is DENIED, for the reason that it does not appear that the order of January 16, 1967, denying leave to appeal was erroneously made.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 14th day of March in the year of our Lord one thousand nine hundred and sixty-seven.

(sgd) Donald F. Winters,
Clerk.

APPENDIX

Court of Appeals Order Granting Stay

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the Fifth day of May in the year of our Lord one thousand nine hundred and sixty-seven.

Present the Honorable
T. JOHN LESINSKI
Presiding Judge
JOHN H. GILLIS
LOUIS D. McGREGOR
Judges

WESLEY G. NELLES,
Plaintiff - Appellant,
vs.
LYNN M. BARTLETT, Superintendent of Public Instruction of the State of Michigan,
Defendant-Appellee,
and
LENTON G. SCULTHORP, Successor to Lynn M. Bartlett,
Party - Appellee.

Calendar # 1194

Plaintiff-appellant, Wesley G. Nelles, having filed an ex parte motion seeking an order directing the superintendent of public instruction of the state of Michigan, his agents, servants, employees and successors, from interfering with the plaintiff's self-employment as a consulting psychologist, and the defendant having appeared by his counsel and objected thereto,

IT IS ORDERED that the defendant, superintendent of public instruction, his agents, servants, employees and successors, are prohibited from interfering with the plaintiff in the exercise of his self-employment as a consulting psychologist for a period of 10 days from the date hereof;

IT IS FURTHER ORDERED that this stay is conditioned on plaintiff filing an application for a stay with the Supreme Court of the United States, or with a justice thereof, within 10 days, and it is further conditioned on his noting an appeal

to the Supreme Court of the United States within 10 days of the entry of the judgment of this Court in favor of plaintiff herein.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, the Fifth day of May
in the year of our Lord one thousand nine hundred and sixty-seven.

(sgd) Ronald L. Dzierbicki,
Clerk

APPENDIX

Court of Appeals Order Granting Extension of Stay

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the Fifteenth day of May in the year of our Lord one thousand nine hundred and sixty-seven.

Present the Honorable
T. JOHN LESINSKI
Presiding Judge
JOHN H. GILLIS
LOUIS D. McGREGOR
Judges

WESLEY G. NELLES,
Plaintiff-Appellant,
v.
LYNN M. BARTLETT, Superintendent of Public Instruction of the State of Michigan,
Defendant-Appellee,
and
LENTON G. SCULTHORP, successor to Lynn M. Bartlett,
Party-Appellee.

Calendar No. 1194

Appendix

In this cause a motion is filed by the plaintiff for an order continuing the stay order heretofore entered by this Court together with a motion for immediate consideration thereof, and an answer in opposition thereto having been filed and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for immediate consideration of the motion for continuance of the stay be, and the same hereby is GRANTED.

IT IS FURTHER ORDERED that the stay order heretofore entered by this Court on May 5, 1967 be, and the same hereby is continued until June 15, 1967, or until such time as appellant's petition for a stay heretofore filed with the United States Supreme Court is determined, whichever is prior in time.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this Fifteenth day of May
in the year of our Lord one thousand nine hundred and sixty-seven.

(sgd) Ronald L. Dzierbicki,
Clerk

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IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1966

No.

WESLEY G. NELLES,

Appellant,

v.

LYNN M. BARTLETT, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF MICHIGAN,

and

LENTON G. SOULTHORP, SUCCESSOR TO LYNN M. BARTLETT,

Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16, paragraph (b) of the Rules of this Court, move that the appeal be dismissed or alternatively to affirm the judgment of the Michigan Court of Appeals, on the grounds that question one (Jurisdictional Statement, page 14, 15) does not present a substantial federal question and the judgment, in relation to question two, (Jurisdictional Statement, page 15) rests on an adequate non-federal basis.

MICHIGAN STATUTES INVOLVED

The Michigan statutes pertinent to this case are the Michigan Psychologist Registration Act (Act 257, PA

1959, as amended, being CLS 1961, §338.1001, et seq; MSA 1965 Cum Supp §14.677(1), et seq) and Act 197, PA 1952, as amended, being CLS 1961 §§24.100, et seq; MSA 1961 Rev Vol §§3.560(21.1), et seq) providing for rules of administrative procedure and judicial review of administrative decisions.

QUESTIONS PRESENTED BY THIS MOTION TO DISMISS OR AFFIRM

The questions presented by this motion of appellees to dismiss or affirm are the following:

1. DOES APPELLANT RAISE A SUBSTANTIAL FEDERAL QUESTION BY HIS CONTENTION THT THE MICHIGAN PSYCHOLOGIST REGISTRATION ACT VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

2. DOES THE JUDGMENT, IN RELATION TO ANY QUESTION CONCERNING THE APPLICATION OF SAID ACT TO APPELLANT, IN DENYING HIM CERTIFICATION, REST ON AN ADEQUATE STATE PROCEDURAL BASIS?

STATEMENT OF THE CASE

The substantive statute involved in this case is the Michigan Psychologist Registration (Act 257, PA 1959, as amended, being CLS 1961, §338.1001, et seq; MSA 1965 Cum Supp §14.677(1) et seq.). Section 8 of the Act allowed the certification of those who could not meet the

formal education requirements of the other sections, for a period of two years after the Act's effective date.

On December 13, 1960, plaintiff applied for certification as a consulting psychologist under Section 8 and certification was denied. Section 8 was amended by Act 132, PA 1961 to provide for a hearing. On June 29, 1961, appellant requested a hearing and a formal hearing with the requisite notice was had and a transcript was taken. Appellant's application was again denied on January 29, 1962.

On March 15, 1962, appellant brought an action in Circuit Court contesting the constitutionality of the Act and in the alternative, requesting an order requiring defendant to certify appellant pursuant to Section 8. Appellant did not seek to review the decision of appellee pursuant to the recognized and available methods of reviewing an administrative decision. The Circuit Court dismissed the complaint on the grounds that the Act was constitutional and that the Circuit Court lacked jurisdiction to mandamus a state officer. The Circuit Court, however, granted an injunction against enforcement of the Act until a decision of the Court of Appeals.

The Court of Appeals entered its decision in this matter on November 9, 1966 (5 Mich. App. 47). It found that

(1) plaintiff did not seek timely review of the decision of the administrative agency, and

(2) the Psychologist Registration Act was not in conflict with the United States or Michigan Constitution.

The Michigan Supreme Court on January 16, 1967, de-

nied the application for leave to appeal filed by appellant "for the reasons that plaintiff-appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous." On March 14, 1967, the Michigan Supreme Court denied a motion for rehearing "for the reason that it does not appear that the order of January 16, 1967, denying leave to appeal was erroneously made."

On May 5, 1967, the Michigan Court of Appeals granted a ten day stay to appellant on condition that appellant file an application for a stay with this Court or with a Justice thereof and on condition that an appeal be noted to this Court. Appellant allowed nearly sixty days to elapse after the Michigan Supreme Court denied the motion for rehearing before he applied to this Court for a stay on May 12, 1967.

On May 15, 1967, the Michigan Court of Appeals granted a continuance of the stay granted May 5, 1967 until June 15, 1967, or until appellant's petition for a stay filed with this Court is determined, whichever is prior in time.

On May 24, 1967, appellant's petition for stay was denied by Justice Potter Stewart. Appellees received appellant's Jurisdictional Statement on July 3, 1967.

ARGUMENT

I

There is no substantial federal question involved in determining the constitutionality of the Michigan Psychologist Registration Act.

(a) In a recent decision of this Court, in a substantially similar case, this Court granted a motion to dismiss upon the ground that there was no substantial federal question involved.

A very similar New York act was upheld against constitutional objections in *National Psychological Ass'n v. University of New York*, 8 NY 2d, 197, 203 NYS 2d, 821, 168 NE 2d 649 (1960). This Court dismissed an appeal therefrom "For want of a substantial federal question." 365 U.S. 298 (1961).

An examination of both the New York and Michigan statutes shows there is no basic difference between them. Both make certification a prerequisite to holding oneself out to the public as a psychologist in connection with offering to render or rendering services as such for a fee. Both provide criminal penalties for doing so without certification. Neither prohibits non-certificants from merely rendering psychological services. Each statute has certain educational, experience, and examination requirements to be met before certification is granted. Finally, both states have judicial remedies available to review administrative decisions on certification.

In the above cited New York case, the New York Court of Appeals stated that the statute in question, being clearly related to public health and welfare, was a proper exercise of the state's police power under the due process clause of the Fourteenth Amendment to the United States Constitution. Further, the Court held that the statute contained clearly discernible standards for administrative guidance and met any requirement of definiteness imposed upon criminal statutes.

A comparison of this case with the above cited New

York case reveals that no new due process questions are raised by the instant case. Thus, this Court should again grant a motion to dismiss for want of a substantial federal question.

(b) This Act regulating psychologists by certification is a reasonable exercise of the state police power raising no meritorious due process question.

This Court has consistently upheld the police power of the states to regulate the practice of medicine and the related healing arts. *Dent v. West Virginia*, 129 U.S. 114 (1889); *Watson v. Maryland*, 218 U.S. 173 (1910); *Graves v. Minnesota*, 272 U.S. 425 (1926). In 1959 a lower federal court had occasion to examine decisions of this Court in a search for guidance in the medical regulation area. That examination brought forth the following summary statement:

> "In review of the cases discussed, supra, it is of interest to note that the Supreme Court has never changed its policy of reviewing with reluctance and self-restraint state regulations in the medical field, even though other state economic regulations have met a fluctuating substantive due process stand." *England v. Louisiana State Board of Medical Examiners*, 263 F 2d 661, 673, (1959).

The means of regulation in the Act are reasonable in that only the privilege of advertising oneself to the public as a psychologist offering services for value is denied to non-certificants. This mild regulatory form is clearly related to the salutary statutory objective of protecting the public from unqualified persons rendering psychological services. It follows that the requirements of due pro-

cess contained in *Nebbia v. New York*, 291 U.S. 502, 525, (1934) are met.

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." P. 525.

(c) The Act in question contains adequate standards for administrative implementation and in any event, the question of improper delegation of power is a state law question.

In support of the contention that the Act in question contains adequate standards, the so-called "grandfather clause" in Section 8, under which appellant sought certification as a consulting psychologist, is set out below:

> "§14.677(8) Certification without examination, conditions, limitation, reciprocity, educational requirements, modification.]
>
> "Sec. 8. (1) For a period of 2 years after the effective date of this act, the superintendent may certify, with or without examination as consulting psychologists, psychologists and psychological examiners or technicians, any person:
>
> "(a) Who meets the requirements of subdivisions (1), (2) and (3) of Section 3.

"(b) Who by the quality and duration of his experience is judged by the superintendent to have qualifications equivalent to those offered by the educational requirements of the provisions of this act governing certification at the various levels.

(c) Who has been engaged in full-time psychological work at the appropriate level for at least 5 years within the 10 year period next preceding the effective date of this Act.

(d) Who pays the certificate fees required under sections 3, 4 or 6 of this act.

[(e) Any applicant denied certification under this section shall upon written request be afforded a hearing as provided for under section 10 of this act.]"

The statutory provisions referred to in Section 8 are set out below.

"§14.677(3) Applicants for certification; qualification.] Sec. 3. Every applicant for certification under this act shall: (1) be of good moral character and reputation, (2) be a citizen of the United States or have declared his intention of becoming one, (3) be at least 21 years of age.

"§14.677(4) Consulting psychologist certification; qualifications of applicant; fees.] Sec. 4. Except as provided in this act, every applicant for certification as a consulting psychologist shall meet the following requirements, in addition to those specified in section 3.

(1) Be duly graduated with a doctoral degree or its

equivalent, from a reputable institution generally so recognized at the time of granting of such degree.

(5) Have paid a certificate fee and, where an examination is required, an examination fee. The examination fee and the certificate fee shall be $25.00 and $15.00, respectively."

Thus, we find in those portions of the Act under which appellant sought certification reasonably precise standards as to moral character and reputation, citizenship, and age. Further, we find the educational requirement to be qualifications equivalent to a doctoral degree in psychology, or its equivalent, from a reputable institution generally so recognized. Finally, there is a requirement of full-time psychological work for a defined period of time. It is submitted that these clear guidelines effectively preclude the existence of arbitrary and capricious administrative power under the Act.

The Michigan Court of Appeals fully considered this issue and concluded as follows:

"When the act is read as a whole, the legislative policy is apparent from the reasonably prescribed standards seen within the act." (Jurisdictional Statement, Page 46).

Furthermore, the question of improper delegation of legislative power is not a federal question. Rather, it is a state law question. *Douglas v. Noble*, 261 U.S. 165, 168 (1923); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 611-613 (1937). This principle is well illustrated by an examination of *Husband v. Cassell*, 130 So 2d 69 (1961), a case upon which appellant relies heavily and the only case appellant cites in his jurisdictional statement that deals

with a state statute regulating the certification of psychologists.

This case considered the constitutional validity of a Florida statute providing for certification of psychologists. It was decided by the Florida Supreme Court solely on a state law basis. The Florida Court held that the statute, lacking sufficient standards for administrative implementation, was thus an invalid delegation of legislative power contrary to the provision in the Florida constitution vesting the legislative power of the state in the legislature.

The portions of the Act quoted above demonstrate the soundness of the conclusion reached by the Michigan Court of Appeals that this statute contains an adequate expression of legislative policy for administrative guidance. Furthermore, it has been demonstrated that the question of improper delegation of legislative power is answered by reference to state rather than federal law.

(d) The provisions of this Act relating to criminal prosecution, which have never been invoked against appellant, are sufficiently definite to meet any void for vagueness test.

Appellant attacks the Act as being unconstitutionally vague and indefinite. This Court has used a void for vagueness rule in testing criminal statutes. *Roth v. United States*, 354 U.S. 476, (1957) reh. den. 355 U.S. 852 (1958). The purpose underlying that rule is to require sufficient notice of the type of activity which is made criminal. This Act, as demonstrated by the criminal provisions set out below, certainly gives sufficient notice of the criminal activity proscribed.

No person may use the titles, "certified consulting psychologist," "certified psychological technician" unless he has a certificate specifying him to be such under the provisions of this act. Certified psychological examiners or technicians may use the title "certified psychological assistant" in any case where they are permitted to use their certification titles under the provisions of this act."

"§14.677(12) Advertising or misrepresentation as psychologist; prohibition.] Sec. 12. No person, other than an active certified consulting psychologist, may advertise or represent himself to the public in any way which will lead the public to believe that he is a psychologist or that he is rendering or offering to render psychological services. A person is so advertising or representing himself within the meaning of this section if:

(a) He uses or allows to be used in describing himself or his services in any kind of advertising or representation such terms as, by way of illustration but not of limitation, psychologist and psychological, psychoconsultant and psychoconsultation, psychotechnician and psychotechnical, psychometrician and psychometric, psychophysicist and psychophysical; and

(b) In connection with such advertising or representation, he renders or offers to render services for or in expectation of a fee or anything of value."

Thus, it is clear that this Act prohibits non-certificants from using certain titles or from advertising themselves or their services to the public by the use of certain words in connection with offering to render or rendering psychological services for anything of value. Anyone who reads these

provisions will be aware of the type of activity prohibited.

Appellant's contention that the Act is unconstitutionally vague and indefinite is untenable in view of the specific criminal prohibitions set out above. Appellant, in his jurisdictional statement, cites no authority to support his void for vagueness argument. Finally, it should be remembered that appellant has never been prosecuted under this Act.

II

The judgment, in regard to Appellant's question two (Jurisdictional Statement, page 15) concerning application of the Act to Appellant, in denying him certification, rests on an adequate state procedural basis.

This problem was considered at length by the unanimous Michigan Court of Appeals opinion in this case. (Jurisdictional Statement, pages 43-46). That opinion approved dismissal of appellant's complaint by the trial court.

The Court of Appeals first ruled that the Michigan administrative procedures act (Appendix, pp 1b-8b) was applicable to the procedure for obtaining a psychologist's certification from the Superintendent of Public Instruction. Section 8 of the administrative procedures act (Appendix, p 6b) provides for judicial review of the actions of state agencies by the filing of an action in the appropriate circuit court within 30 days after personal service or after the mailing of the final decision of said agency. The Court of Appeals pointed out that appellant did not pursue this statutorily provided remedy. In fact, appellant's complaint, as originally filed in the trial court, made no attempt to request review of the administrative decision denying him certification. Rather, the complaint, in circumvention of

the procedure provided for court review of administrative decisions, demanded an injunction restraining appellee from interfering with the appellant's practice of psychology and, in the event the act should be found constitutional, an order requiring appellee to certify appellant as a consulting psychologist. Additionally, the complaint attacked the constitutionality of the Michigan Psychologist Registration Act.

The Court of Appeals also noted that even construing the complaint as a request for judicial review of the administrative decision, it was filed too late to preserve the right to judicial review under the 30 day time limit found in Section 8 of the administrative procedures act. (Appendix, p 6b) The final agency decision was mailed to both appellant and his attorney on January 29, 1962, and the original complaint was not filed until March 15, 1962.

The Court of Appeals concluded that appellant had failed to timely or properly pursue his judicial remedy, provided for by the administrative procedure act, (Appendix, pp 6b-8b) to review a final decision of a state agency. Consequently, the Court of Appeals did not deal with any substantive issues, constitutional or otherwise, relating to the application of the Michigan Psychologist Registration Act to appellant, in denying him certification.

It should also be pointed out that Section 8 (6) (a) (Appendix, p 7b) of the administrative procedures act specifically authorizes the circuit court to reverse or modify an agency decision if in violation of constitutional provisions. Also, Section 9 (Appendix, p 8b) of the administrative procedures act provides for appeal of any final circuit court judgment under said act.

Consequently, it is clear that under Michigan law appel-

lant had both the right and the opportunity to obtain full judicial review of the application of the Michigan Psychologist Registration Act to appellant, in refusing him certification. He did not do so in a timely or proper fashion under applicable state procedural requirements.

This Court has consistently refused to review state court judgments resting on adequate substantive or procedural state grounds. It is also true that whether non-compliance with state procedure precludes this Court from considering federal questions is itself a federal question. The test is whether a state's insistence on compliance with a rule of procedure serves a legitimate state interest. Once the test is met, this court is precluded from reviewing any federal claim put forth in the state litigation that is disposed of by the adequate state procedural ground. *Henry v. Mississippi*, 379 U.S. 443, 446-448, (1965).

Michigan has a definite interest in requiring litigants to adhere to the procedure for court review of administrative decisions provided by statute. Such a requirement is necessary to implement the orderly and integrated statutory scheme of administrative procedure and judicial review of such procedure found in the administrative procedure act. (Appendix, pp 1b-8b) This is clearly a legitimate state interest. Thus, any question concerning application of the Psychologist Registration Act to appellant has been disposed of on an adequate state procedural basis.

CONCLUSION

Appellees urge the Court to dismiss or alternatively to affirm the judgment of the Michigan Court of Appeals on the grounds that question one (Jurisdictional Statement, page 14, 15) does not present a substantial federal question

and the judgment, in regard to appellant's question two (Jurisdictional Statement, page 15) rests on an adequate non-federal basis.

Respectfully submitted,

FRANK J. KELLEY
Attorney General
of the State of Michigan
on Behalf of Appellees,
The Capitol
Lansing, Michigan 48902

ROBERT A. DERENGOSKI
Solicitor General
of the State of Michigan
on Behalf of Appellees,
The Capitol
Lansing, Michigan 48902

EUGENE KRASICKY
Assistant Attorney General
on Behalf of Appellees
The Capitol
Lansing, Michigan 48902

APPENDIX

RIGHTS OF PUBLIC IN ADMINISTRATIVE PROCEDURE BEFORE STATE ADMINISTRATIVE AGENCIES

Act 197, 1952, p 288; eff Sept 18.

AN ACT to prescribe the rights of the public in the administrative procedure before state administrative agencies; to provide for the promulgation of procedural rules and regulations; to provide for the hearing of contested cases, and rules of evidence with respect thereto; and to provide for decisions and orders of state agencies.

The People of the State of Michigan enact:

§ 3.560(21.1) Definitions.] Section 1. For the purposes of this act:

(1) "Agency" means any state board, commission, department, bureau or officer, authorized by law to make rules or to adjudicate contested cases, except the workmen's compensation commission, the employment security commission, the department of revenue, the public service commission and those in the legislative and judicial branches.

(2) "Rule" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public, nor such rules and regulations of the state department of

health as may be necessary during emergencies, floods, epidemics, invasion or other disasters; nor emergency rules, regulations and orders issued under section 16 of Act No. 61 of the Public Acts of 1939, as amended, being section 319.16 of the Compiled Laws of 1948; nor emergency rules, regulations and orders issued under section 22 of Act No. 326 of the Public Acts of 1937, as amended, being section 319.72 of the Compiled Laws of 1948[; nor to the necessity hearings by county road commissions and the state highway commissioner which are required by Act No. 352 of the Public Acts of 1925, as amended, being sections 213.171 to 213.199, inclusive, of the Compiled Laws of 1948].

(3) "Contested case" means a proceeding before an agency in which the legal rights, duties or privileges of a specific party or specific parties are required by law or constitutional right to be determined after an opportunity for an agency hearing.

§ 3.560(21.2) Adoption of rules governing formal and informal procedures; descriptive statements of procedures; notice of adoption, amendment or repeal.] Sec. 2. In addition to other rule-making requirements imposed by law:

(1) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this act. Such rules shall include rules of practice before the agency, together with forms and instructions.

(2) To assist interested persons dealing with it, each agency shall so far as deemed practicable supplement its rules with descriptive statements of its procedures.

(3) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall so far as practicable, and in compliance with any other

applicable statutory requirement, publish or otherwise circulate notice of its intended action and shall send written notice to any person who has previously made a request in writing to the agency to be notified of any proposed new rule or change in rules and afford interested persons opportunity to submit data or views orally or in writing.

§ 3.560(21.3) Petition requesting promulgation, amendment or repeal of rule.] Sec. 3. Any interested person may petition an agency requesting the promulgation, amendment or repeal of any rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition.

§ 3.560(21.4) Contested cases; hearing, notice, powers of officer of agency, record; informal disposition of case.] Sec. 4. In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice, in conformity with all applicable statutory requirements. The notice, in addition to complying with any other applicable statutory requirement, shall state the time, place and issues involved, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. Any officer of any agency may administer an oath or affirmation to a witness in any matter before the agency, certify to official acts, and take depositions. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe [mechancially recorded testimony or] shorthand notes unless requested for purposes of rehearing or court review. Informal disposition with the approval of the agency may also be made of any contested case by stipulation, agreed settlement, consent order or default. Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

§ 3.560(21.5) Same; admission and exclusion of evidence; cross-examination; judicial notice and evaluation of evidence; referral of hearing to agency staff member.] Sec. 5. In contested cases:

(1) Agencies shall so far as practicable follow the rules of evidence applicable to proceedings in chancery cases, but may in their discretion admit and give probative effect to any evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, immaterial and unduly repetitious evidence.

(2) All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(3) Every party shall have the right of cross-examination [which shall include the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence;] and shall have the right to submit rebuttal evidence.

(4) [Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical or scientific facts within their specialized knowledge. Parties shall be notified, either before or during the hearing or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized

knowledge in the evaluation of the evidence presented to them. The provisions of this subsection shall not be construed as permitting an agency to take notice of any evidence contrary to existing statutory provisions applicable to such agency.

(5) Any hearing that is required to be conducted under the provisions of this act may be referred by said agency to a member of the staff of said agency who shall hear the evidence, prepare a record and file a report with all parties involved.

§ 3.560(21.6) Same; decision by officials of agency who have not heard or read evidence, procedure.] Sec. 6. Whenever in a contested case the officials of the agency who are by law to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other than the agency itself shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

§ 3.560(21.7) Same; adverse decisions and orders.] Sec. 7. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Parties to the proceedings shall be notified forthwith of the decision and order in person or by mail. A copy of the decisions and order and accompanying findings and conclusions shall be delivered

or mailed upon request to each party and to his attorney of record.

§ 3.560(21.8) Same; judicial review of final decision.] Sec. 8. (1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this act; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief or trial de novo, provided by law. In any proceeding in which alternative methods of appeal are available, any person desiring to take a cross appeal shall take said cross appeal proceeding in the same manner in which the original appeal has been taken.

(2) Proceedings for review shall be instituted by filing a petition in the circuit court in the county wherein appellant resides or has its principal place of business in Michigan or in the circuit court for Ingham county, within 30 days after personal service of the final decision of the agency or within 30 days after the mailing thereof, if notice is given by mail: Provided, however, That when a shorter period of time is specified by any statute as the period within which appeals may be taken from the decision of an agency, any appeal taken pursuant to this act must be filed within such shorter period. Copies of the petition shall be served personally or by registered mail upon the agency and all other parties of record. The court, in its discretion, may permit other interested persons to intervene.

(3) Within 30 days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceedings, the record may be shortened. Any party unreason-

ably refusing to stipulate to limit the record may be taxed by the court for additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(4) If, before the date set for hearing, application is made to the court for leave to present additional evidence to the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken upon such conditions as the court deems proper. The agency may modify its findings and decisions by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decisions.

(5) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court and depositions may on request of the person aggrieved, and in the discretion of the court, be addressed to members of the agency to determine whether they followed the procedures required by law. The court shall, upon request, hear oral argument and receive written briefs.

(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(a) In violation of constitutional provisions; or

(b) In excess of the statutory authority or jurisdiction of the agency; or

(c) Made upon unlawful procedure; or

(d) Affected by other error of law; or

(e) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted, or contrary to the overwhelming weight of the evidence; or

(f) Arbitrary or capricious.

§ 3.560(21.9) Appeal to supreme court.] Sec. 9. An aggrieved party may secure a review of any final judgment of the circuit court under this act by appeal to the supreme court. Such appeal shall be taken in the manner provided by law for appeals from the circuit courts in other civil cases.

§ 3.560(21.10) Supplemental nature of act.] Sec. 10. This act shall be supplemental to and shall not be in derogation of Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.82, inclusive, of the Compiled Laws of 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

NELLES *v.* BARTLETT, SUPERINTENDENT OF PUBLIC INSTRUCTION OF MICHIGAN, ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 327. Decided October 9, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.